Office - Supreme Court, U.S.
FILED
OCT 16 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 130.

FIDELITY-PHILADELPHIA TRUST COMPANY
and
ROBERT B. HAINES, III,
Executors of the Will of Mary H. Haines, Deceased,
Petitioners,

v.

FRANCIS R. SMITH,
Collector of Internal Revenue,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE PETITIONERS.

ROBERT T. MCCRACKEN,
JOHN B. LEAKE,
1421 Chestnut Street,
Philadelphia 2, Pa.,
Counsel for Petitioners.

October 14, 1957.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTE AND REGULATIONS INVOLVED	2
QUESTION PRESENTED	2
STATEMENT	3
SUMMARY OF ARGUMENT	6
ARGUMENT	7
1. The Aggregate Premiums Paid for Each Life Insurance Policy and Annuity Contract Constituted a Divisible Investment	7
The Part of the Investment Represented by the Cash Surrender Values.	
2. Decedent Divided Her Investment by (a) Retaining the Annuity Contracts and (b) Irrevocably Assigning the Life Policies. The Assignees Thereby Became Sole and Complete Owners of a Large Part of Each Investment—the Cash Surrender Values of Each Life Policy—and as Sole Owners They Owned All Income and Other Rights Therein	8
(a) As to the Cash Surrender Values at the Time of Assignment, the Decedent Never Retained Anything for Any Period of Time	8
(b) As to the Annual Increases in Such Values, She Did Not Retain the Income Therefrom for Life	11
(c) The Cash Surrender Values, Moreover, Produced Their Own Income—the Insurance Dividends—Which Belonged to the Assignees	11
3. The Annuity Payments Retained by Decedent Were, in Any Event, Not Income From That Part of the Investment Represented by the Cash Surrender Values	11

INDEX (Continued).

Page

4. The Estate Tax Is Designed to Tax Shifting of Economic Interests at Death. There Was No Shift at Decedent's Death of the Cash Surrender Amounts Theretofore Owned in Toto by the Assignees—and There Is No More Reason to Tax Them Than an Outright Lifetime Gift of Cash 12

The Part of the Investment Represented by the Balance of the Insurance Proceeds.

5. The Amount by Which the Insurance Proceeds Exceeded the Cash Surrender Values Prior to Death Is Not Includible in Decedent's Gross Estate Under Section 811(c)(1)(B) 14

6. The Decision of the Court of Appeals Below Is Wrong and Does Not Reach or Answer the Issue in Controversy 16

CONCLUSION 17

APPENDIX 19

CASES CITED.

	Page
Bohmen v. Harrison, 199 F. 2d 492 (C. A. 7, 1952), affirmed per curiam, 345 U. S. 946 (1953), rehearing denied, 345 U. S. 978 (1953)	5, 13, 14
Estate of Burr et al. v. Commissioner, 156 F. 2d 871 (C. A. 2, 1946), certiorari denied, 329 U. S. 785 (1946)	13
Conway v. Glenn, 193 F. 2d 965 (C. A. 6, 1952)	13
Coolidge v. Long, 282 U. S. 582 (1931)	12
Goldstone v. United States, 325 U. S. 687 (1945)	9
Helvering v. LeGierse, 312 U. S. 531 (1941)	7
Helvering v. Mercantile-Commerce Bank & Trust Company, 111 F. 2d 224 (C. A. 8, 1940), certiorari denied, 310 U. S. 654 (1940)	10
Estate of Reynolds v. Commissioner, 45 B. T. A. 44 (1941)	13
Richards v. Commissioner, 20 T. C. 904 (1953)	10
Estate of Sessoms et al. v. Commissioner, 8 T. C. M. 1056 (1949)	10
In re Uhl's Estate v. Commissioner, 241 F. 2d 867 (C. A. 7, 1957)	10
Young Men's Christian Association of Columbus, Ohio v. Davis, 264 U. S. 47 (1924)	13

UNITED STATES STATUTES.

	Page
Internal Revenue Code of 1939:	
Section 811(c)(1)(B)	2, 6, 9, 14, 19
Section 811(c)(1)(C)	9
United States Code, Section 1254, Title 28, 62 Stat. 928	2
United States Code, Section 2401, Title 28, 62 Stat. 961, as amended, 63 Stat. 104	2

MISCELLANEOUS.

	Page
Treasury Regulations 105, Section 81.18	2, 20

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 130.

FIDELITY-PHILADELPHIA TRUST COMPANY

and

ROBERT B. HAINES, III,
EXECUTORS OF THE WILL OF MARY H. HAINES, DECEASED,
Petitioners,

v.

FRANCIS R. SMITH,
COLLECTOR OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The opinion of the District Court (R. 13a-22a) is reported at 142 F. Supp. 561.

The opinion of the Court of Appeals (R. 84-89), reversing the District Court, is reported at 241 F. 2d 690.

JURISDICTION.

The judgment of the Court of Appeals was entered February 28, 1957 (R. 90). By order dated March 15, 1957, the Court of Appeals denied petitioners' Petition for Rehearing (R. 90-91). The petition for a writ of certiorari was filed May 17, 1957 and was granted June 17, 1957 (R. 91). The jurisdiction of this Court rests on 28, U. S. C., Sections 1254, 2101.

STATUTE AND REGULATIONS INVOLVED.

The statute involved is Section 811(c)(1)(B) of the Internal Revenue Code of 1939 and the regulations involved are Treasury Regulations 105, Section 81.18. The texts of the statute and regulations are set forth in the Appendix, *infra*.

QUESTION PRESENTED.

The decedent, without medical examination, purchased three single premium life insurance policies. As a condition of buying these policies, she also purchased three single premium annuity contracts. She irrevocably assigned to her children—and to a trustee in the case of one policy—every right, privilege, benefit and option under the life policies (including the right to surrender them and to receive their cash surrender values as well as dividends on them). She thus divested herself of all interests in the life insurance policies. But the annuity contracts she retained and received the annuity payments thereunder until her death. Her children, as beneficiaries of the life policies, received the full life insurance proceeds on the decedent's death.

The question is whether (1) the cash surrender values of the life insurance policies or (2), in the alternative, the full life insurance proceeds are includible in the decedent's gross estate, for estate tax purposes, under Section 811(c)(1)(B) of the Internal Revenue Code of 1939 as property transferred by her but in respect of which she retained the income either for life or for a period not in fact ending before her death.

STATEMENT.

This is a suit by the executors under the Will of Mary H. Haines, deceased, for refund of Federal estate taxes of about $97,000 (R. 3a-4a).

In 1934 the decedent purchased three single premium insurance policies covering her life and, at the same times, also purchased three single premium non-refundable annuity contracts (R. 4a-5a). Each life insurance policy was issued without medical examination on the condition that the decedent purchase an annuity contract (R. 6a). She could, however, have purchased the identical annuity contracts at the prices she paid for them without buying any insurance (R. 5a). During her life, the decedent irrevocably assigned to her children the exclusive right to exercise and enjoy every right, privilege, benefit and option conferred by two of the life insurance policies (R. 6a-7a). This included the right to cash in the policies, to receive dividends on them, to change the beneficiaries and to borrow on them (Exs. A, B; R. 25-51). In respect of the third life insurance policy, the decedent made a similar assignment to a trustee of a trust giving the trustee like rights and benefits (Ex. C; R. 7a-8a, and 52-61). The decedent's children were the primary income beneficiaries of this trust (Ex. G; R. 71-76). After July 6, 1938 the decedent had no beneficial or reversionary interest in the trust or the three life policies (R. 6a, 8a). The decedent filed a gift tax return reporting as gifts the transfer of the three life policies and paid gift tax thereon (R. 8a), and the children filed donee's gift tax returns with respect thereto (R. 8a).

The assignees did not surrender and cash in the life insurance policies during the decedent's life (R. 11a). But if they had, this would not have affected the annuities the decedent was receiving, and continued to receive until her death, under the annuity contracts (R. 6a). In so far as the record shows, if the assignees had cashed in the policies, there were no restrictions whatever on their use of any cash

so received except that the trustee would have held subject to the trust the cash it received from the policy assigned to it (Exs. G, H; R. 71-78). In summary form, the assignees and named beneficiaries of the three life policies were as follows (R. 6a-8a):

		Beneficiaries	
	Assignees	*Primary*	*Contingent*
Two Life Insurance Policies	Decedent's Children	Decedent's Children	Trustee
Third Life Insurance Policy	Trustee	Decedent's Children	Trustee

To protect itself in the event the decedent died shortly after purchasing the life insurance policy, each insurance company required that the aggregate consideration for each life policy and the annuity contract bought with it exceed the face amount of the insurance policy (R. 11a-12a).[1] The premiums for each life policy and each annuity contract were at regular rates (R. 5a, 11a-13a). None of the insurance premiums paid for any of the annuity contracts, nor did any of the annuity premiums pay, or constitute consideration, for the life policies (R. 5a, 11a-13a).

The face amount of life insurance policy No. 4842239, one of the two assigned to the children, was $200,000 (R. 4a). The premiums paid for it and the annuity contract bought with it aggregated $220,000 (R. 4a). Upon issuance the cash surrender value of this policy was $164,594 (R. 10a), and just prior to the decedent's death it was $186,404 (R. 11a). The death proceeds of this policy were $200,020 (R.

1. The face amount of each life policy was 10/11ths of the aggregate premiums paid for the policy and annuity contract bought with it (R. 11a-12a).

11a).[2] The decedent died May 7, 1946 (R. 3a), and the proceeds of all three life policies were thereupon paid to her children as beneficiaries (R. 11a). All annuity payments under the annuity contracts ceased upon decedent's death and such contracts then had no remaining value (R. 6a).

The District Court, following the decision of the Court of Appeals of the Seventh Circuit in *Bohnen v. Harrison*,[3] 199 F. 2d 492 (1952), affirmed *per curiam* by this Court in a four-to-four decision, Justice Jackson not participating, 345 U. S. 946 (1953), rehearing denied 345 U. S. 978 (1953), held that none of the insurance was includible in the decedent's gross estate, since she had retained no income or other interest in the life policies "in short, she retained no string over the proceeds of these policies" (R. 21a). The Court of Appeals reversed on the ground that, notwithstanding the assignments, the lifetime transfers of the insurance policies were essentially testamentary dispositions (R. 84-89).

---

2. The cash surrender values and death proceeds of the two other life insurance policies were as follows (R. 10a-11a):

Policy No.	Cash Surrender Value Upon Issuance	Cash Surrender Value Immediately Prior to Decedent's Death	Death Proceeds
488583o	$83,180	$93,595	$100,028.65
2544451	41,550	46,250	50,000.00

SUMMARY OF ARGUMENT.

1. The decedent's purchase of each life insurance policy and annuity contract constituted a divisible investment which she divided by (a) retaining the annuities and (b) assigning to others all rights under the life policies, including the right to cash them in. By the assignments the decedent gave away completely a large part of her investments, the cash surrender values of the life policies. In making these absolute and unqualified gifts, the decedent parted during her life with her entire bundle-of-ownership rights in these amounts, including the income therefrom and every other benefit therein. She gave away both the fruit and the tree and clearly did not, as required by Section 811(c)(1)(B), retain for her life, or for a period not in fact ending before her death, the income from such cash surrender values.

2. The amounts by which the full insurance proceeds exceeded the cash surrender values are also not includible in her gross estate. The decedent completely assigned during her life everything payable under the life insurance policies. Moreover, the annuity contracts and annuity payments were independent of the insurance since the decedent could have purchased the same annuity income without buying any insurance at all.

ARGUMENT.

1. The Aggregate Premiums Paid for Each Life Insurance Policy and Annuity Contract Constituted a Divisible Investment.

Before proceeding with the substance of the argument in this case, the decision of this Court in *Helvering v. LeGierse*, 312 U. S. 531 (1941) must be noted. In that case, Mrs. LeGierse bought an insurance policy and annuity contract under circumstances like those here, except that she retained and owned both at her death. Hence, there was no question such as here. The issue was whether her estate could benefit by the then statutory provision permitting an exclusion from the gross estate of $40,000 of life insurance. This Court denied her estate the exclusion on the ground that there was no insurance, there being an absence of insurance risk since the total premiums paid exceeded the face amount of the insurance. In the words of the Court of Appeals below (R. 86), that case "removed the 'life insurance' label from transactions such as these and directed that they be treated as investments." The especial significance of the *LeGierse* case, in so far as this proceeding is concerned, is that this Court took cognizance of the fact that the investment, after being made, was divisible and separable since as here the insurance was assignable and surrenderable without the annuity. This Court stated (at p. 541):

> "*It is true that the 'insurance'* contract looks like an insurance policy, contains all the usual provisions of one, and *could have been assigned or surrendered without the annuity.*" (Emphasis added)

THE PART OF THE INVESTMENT REPRESENTED BY THE CASH SURRENDER VALUES.

---

2. Decedent Divided Her Investment by (a) Retaining the Annuity Contracts and (b) Irrevocably Assigning the Life Policies. The Assignees Thereby Became Sole and Complete Owners of a Large Part of Each Investment—the Cash Surrender Values of Each Life Policy—and as Sole Owners They Owned All Income and Other Rights Therein.

(a) *As to the Cash Surrender Values at the Time of Assignment, the Decedent Never Retained Anything for Any Period of Time.*

The critical facts in this case are that the decedent divided her investments during her life by retaining the annuity contracts and annuity payments thereunder for herself (R. 6a) and by irrevocably assigning to others every right, privilege, benefit and option under the life insurance policies (R. 6a-8a). By reason of the assignments the assignees became entitled to surrender and cash in the policies, to receive all dividends on them, to change the beneficiaries, and to borrow on them (Exs. A, B, C, G, H; R. 25-78). The effect was to make the assignees, during the decedent's life, the absolute owners of a large segment of each investment, namely the cash surrender value of each life policy.

To illustrate, let us analyze the situation with respect to one policy which was assigned to the children. Life insurance policy No. 4842239 had a face amount of $200,000 (R. 4a). The single premiums paid for this policy and the annuity contract bought with it aggregated $220,000 (R.

4a), this being the investment. Upon issuance the cash surrender value of this life policy was $164,594 (R. 10a) and this increased from year to year (Ex. A; R. 25-37) and just prior to decedent's death was $186,404 (R. 11a). When the assignment of the policy became complete,[3] the decedent's children then had the sole and exclusive right to cash it in and to obtain the cash surrender value, $164,594. At that moment the decedent parted with all possession, title and enjoyment, and her entire bundle-of-ownership rights in that amount, and the children's ownership of that amount was unqualified and unlimited. They were free to do with the cash surrender amount as they wished, to leave it with the insurance company, to take it from the insurance company and to buy government bonds, race horses or anything they may have liked. Their decision was to allow their moneys to remain with the insurance company (R. 11a) with a view to receiving something else on decedent's death, namely, the excess of the full insurance proceeds over the prior-to-death cash surrender value. The critical and inescapable point, however, is that the children alone had the sole right to, and power over, the cash surrender value. Their complete and present right to such amount carried with it the right to all the income and other benefits it might produce, just as the sole owner of a bond or a bank deposit owns and is entitled to every single attribute of his asset. In no way did the decedent limit or postpone their enjoyment of the cash surrender value. In no way could the insurance company—the holder of the funds—postpone or control their enjoyment of it.

Section 811(c)(1)(B) requires of a decedent that "he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the [trans-

3. Upon issuance (Ex. A; R. 6a-7a, and 25-37).

ferred] property . . . .'[4] The statute is simply not satisfied with respect to the cash surrender value at the time of the assignment, $164,954. The decedent never retained anything for any period of time from this amount.

Moreover, the decedent derived no benefit whatever from the children's decision to allow their share of the investment to remain with the insurance company. For the annuity payments which she had retained would not have been affected at all by continuation or termination of the insurance (R. 6a). Even if we assumed, directly contrary to these facts, that the decedent derived some benefit from the cash surrender value remaining with the insurance company, such benefit in any event would be nothing she had retained, as the statute requires, but rather a gift from the assignees. The explicit statutory language is "he has retained", and the cases too show that the decedent must himself have retained a legal right to the income from the transferred property for life. Absent such retention, the statute is not applicable. *In re Uhl's Estate v. Commissioner*, 241 F. 2d 867 (C. A. 7, 1957); *Helvering v. Mercantile-Commerce Bank & Trust Company*, 111 F. 2d 224 (C. A. 8, 1940), certiorari denied, 310 U. S. 654 (1940); *Estate of Sessoms, et al. v. Commissioner*, 8 T. C. M. 1056 (1949); *Richards v. Commissioner*, 20 T. C. 904, 916 (1953).

---

4. The decision of this Court in *Goldstone v. United States*, 325 U. S. 687 (1945), although involving an insurance policy and annuity contract purchased under similar circumstances, is irrelevant and inapplicable here (a) because an altogether different statute was in issue, namely, Section 811(c)(1)(C) of the 1939 Internal Revenue Code relating to transfers intended to take effect in possession or enjoyment at or after death and (b) because Goldstone had reserved, and possessed at his death, a reversionary interest in both the life insurance proceeds and also a lump sum payable under the annuity contract. As stated by this Court at page 692:

> "The essential element in this case, therefore, is the decedent's possession of a reversionary interest at the time of his death, delaying until then the determination of the ultimate possession or enjoyment of the property."

What has been said heretofore by way of illustration as to the investment involving life insurance policy No. 4842239 is true with respect to the other two investments.

(b) *As to the Annual Increases in Such Values, the Decedent Did Not Retain the Income Therefrom for Life.*

The cash surrender amounts of all three life insurance policies were higher just before the decedent's death (R. 11a) than upon the earlier assignments of them (R. 10a). As in the case of the cash surrender values at the time of the assignments, the assignees prior to, and irrespective of, the decedent's death had the absolute and sole one hundred percent ownership of these increases. It is equally clear, therefore, that the decedent did not retain the income from them (i) for her life or (ii) for a period not in fact ending before her death.

(c) *The Cash Surrender Values, Moreover, Produced Their Own Income—the Insurance Dividends—Which Belonged to the Assignees.*

One other very important factor not to be ignored is that the assignees' segment of the investments produced its own "income" to which the assignees alone were entitled and which the decedent had not retained for her life. This "income" consisted of the insurance dividends (Exs. A, B, C; R. 9a, and 25-70).

3. The Annuity Payments Retained by Decedent Were, in Any Event, Not Income From That Part of the Investment Represented by the Cash Surrender Values.

For the statute to apply, the decedent must have retained *the income* from the transferred property for her life or for a period not in fact ending before her death. The annuity payments did not have their source in, and were not income from, the cash surrender values of the life insurance policies. As already noted, they would have been unaffected if the cash surrender amounts had been paid out by the in-

surance companies upon surrender of the life policies (R. 6a). It is also unrealistic to view the cash-surrender-value part of the investments as the source of the annuities. Had the insurance companies so regarded them, they would have been foolhardy to say the least, knowing full well that these parts—constituting over 75% of each investment—could have been taken from them at any time at the "say so" of the assignees.

Cashing in the life policies would have been very different from the situation where a remainderman of a trust sells his remainder interest. In the trust where the decedent retains the income for life, the trust corpus remains immovable in the trustee's hands as the generating source of the retained income. Neither the remainderman nor the new purchaser of the remainder interest can obtain possession of such corpus until the trust ends. The opposite is true here, for the assignees could have removed from the insurance companies' hands the cash surrender values and yet the annuity payments—the alleged income—would have continued unchanged.

4. The Estate Tax Is Designed to Tax Shifting of Economic Interests at Death. There Was No Shift at Decedent's Death of the Cash Surrender Amounts Theretofore Owned in Toto by the Assignees and There Is No More Reason to Tax Them Than an Outright Lifetime Gift of Cash.

The scope and purview of the Federal estate tax is illustrated in *Coolidge v. Long*, 282 U. S. 582, 606 (1931), where Mr. Justice Roberts in his dissenting opinion sketched the theory of the Federal estate tax and compared it with an inheritance tax. At page 609 he stated:

> "The one is collected on the transfer of his estate by a decedent; *it taxes* not that to which some person succeeds upon a death, *but that which ceased by reason of death* . . . . The other is laid on the right to become beneficially entitled to property on the death of its former owner." (Emphasis added)

Similarly in *Young Men's Christian Association of Columbus, Ohio v. Davis*, 264 U. S. 47, 50 (1924), Mr. Chief Justice Taft stated:

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. *What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death.*" (Emphasis added).

In so far as the cash surrender amounts are concerned, nothing ceased at the decedent's death and nothing then passed to the assignees. No part thereof was in suspense until her death, and her death brought about no economic shift of these amounts. There is no more reason for taxing them, under Section 811(c)(1)(B), than for taxing outright lifetime gifts of cash to the assignees. Properly speaking, neither of these amounts is includible in a decedent's gross estate under that section.

There has been much confusion in the cases on the question presented here, as witnessed by the decisions in *Bohnen v. Harrison*, 199 F. 2d 492 (C. A. 7, 1952), affirmed *per curiam* by this Court in a four-to-four decision, Justice Jackson not participating, 345 U. S. 946 (1953), rehearing denied 345 U. S. 978 (1953); *Estate of Burr et al. v. Commissioner*, 156 F. 2d 871 (C. A. 2, 1946), certiorari denied 329 U. S. 785 (1946); *Conway v. Glenn*, 193 F. 2d 965 (C. A. 6, 1952); *Estate of Reynolds v. Commissioner*, 45 B. T. A. 44 (1941). This has been caused, it is submitted, by the failure to break down the "insurance" part of the investment into its segments, namely, (a) the cash surrender amount[5] which the assignees wholly owned during the decedent's life (and which in any event did not produce

5. This cash surrender amount was $180,404 in the case of life policy No. 4842239.

the annuity income) and (b) the excess of the full insurance proceeds over the cash surrender amount,[6] which excess first passed to the assignees upon decedent's death.

THE PART OF THE INVESTMENT REPRESENTED BY THE BALANCE OF THE INSURANCE PROCEEDS.

5. The Amount by Which the Insurance Proceeds Exceeded the Cash Surrender Values Prior to Death Is Not Includible in Decedent's Gross Estate Under Section 811(c)(1)(B).

Up to this point petitioners' argument has related to the non-taxability of that part of decedent's investments represented by the cash surrender values of the life insurance policies. Still to be discussed is the question whether the excess of the full insurance proceeds over the prior-to-death cash surrender values is includible in decedent's gross estate. The District Court in this case, following the Court of Appeals for the Seventh Circuit in *Bohnen v. Harrison*, 199 F. 2d 492 (1952), affirmed *per curiam* in a four-to-four decision, 345 U. S. 946, rehearing denied, 345 U. S. 972 (1953), correctly held, it is submitted, that none of the insurance proceeds was includible in the decedent's gross estate (R. 13a-22a). In the *Bohnen* case it was stated (at p. 493):

> "* * * The annuities were not based upon and in no wise dependent upon any consideration given for the life policy. The money to be paid under the life contract was in no wise based or dependent upon the sum advanced to secure the annuities. The two contracts constituted independent units, two pieces of property. Consequently, when the insured immediately transferred and assigned all of her right, title and interest of every character in and to the policy of

6. This excess was $13,616 for life policy No. 4842239, the full death proceeds of which were $200,020.

insurance, that unit of her estate passed to the assignees, and was no longer her property. It could, therefore, under no conception, constitute a part of her taxable estate when she died thereafter."

The "insurance" here is somewhat analogous to one of those government bonds which are sold at a discount and which attains its face value by the accumulation of interest for twelve years. Had this decedent given one of her children a $1,000 bond which at the time of the gift could have been cashed for only $900, the gift of the entire bond would have been complete. If the donee chose to sacrifice the extra $100 for the sake of obtaining at once the $900, that would have been his privilege. Had he awaited the expiration of the twelve year period in order to obtain the full face value of the bond, that again was his privilege. But from the moment of the gift, that extra $100 belonged to him—either to sacrifice or to await realization as he chose. It would be false to say that the decedent retained for life the income from the $900, since to the contrary the child completely owned the $900 at the time of the gift and was then entitled—and had a legal right—to whatever that money produced. For like reasons, it would be equally false to say that the decedent retained for life the income from such annual increases in the bond as took place prior to its maturity.

The final amount to which the child would become entitled upon maturity of the government bond might be likened to the final amount of "insurance" the children actually became entitled to upon maturity of the life policies, that is, the excess over the cash surrender values just before death. We maintain that the decedent did not retain for life the income from such excess. She had assigned during her life the entire insurance policy and all that went with it. Moreover, she could have purchased the identical annuity contracts—to produce the same annuity income—without purchasing any insurance at all.

6. The Decision of the Court of Appeals Below Is Wrong and Does Not Reach or Answer the Issue in Controversy.

Some of the language in the opinion of the Court of Appeals in this case is confusing and misleading. It might lead to the erroneous belief that the assignees' right to cash in the life policies was limited or that their use of any cash so obtained was not subject to present enjoyment. There is no warrant anywhere in the record for such an implication. Under the assignments the assignees had the absolute right to cash in the life policies (Exs. A, B, C; R. 6a-8a, 25-70). The trustee alone was the only assignee whose use of cash so received was in any way limited, and it would have been obliged to hold such cash pursuant to the terms of the trust (Exs. G, H; R. 71-78) under which the children were the primary income beneficiaries (Ex. G; R. 71-76) and in which the decedent, after July 6, 1938, had no beneficial or reversionary interest (R. 8a).

There are three particularly misleading statements in the opinion of the Court of Appeals. First, the Court stated (R. 85):

> "By July 6, 1938, decedent had assigned irrevocably and unalterably to the beneficiaries all her rights in all death payments."

Although this statement is correct in so far as it goes, the Court failed to state elsewhere that in addition the decedent had assigned all her rights not alone to the death proceeds but also to all life payments, under the insurance, that is, the lifetime cash surrender values plus lifetime dividends on the insurance. Second, the Court next stated (R. 88):

> "In the first place it does not appear that the beneficiaries received anything substantial since they were all contingent beneficiaries and survivorship was unknowable until the death of the decedent. While,

> theoretically, there may have been a possibility of anticipating the death payment by a cash surrender, the anticipators could do nothing with the cash until the survivorship status was determined."

In the light of the uncontroverted facts, none of these statements is factually correct. The Court confused the named beneficiaries of the policies with the assignees of the policies. The assignees received very substantial present rights pursuant to the assignments, namely, among others, the unqualified right to receive at any time the very substantial cash surrender values. As previously noted, there is no warrant in the record for any implication that the assignees'—except the trustee's—use of any cash so obtained was restricted. Third, the Court further stated (R. 89):

> "* * * the shifting of the economic benefits of the investment occasioned by the death of the decedent is too much akin to a testamentary disposition not to be subjected to * * * tax under Sec. 811(c)(1)(B)."

The truth is to the very contrary. The decedent's death caused no shift of economic benefits whatever, in regard to that segment of the investments represented by the prior-to-death cash surrender values of the three life insurance policies.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed.

ROBERT T. MCCRACKEN,
JOHN B. LEAKE,
Counsel for Petitioners.

October 14, 1957.

APPENDIX.

STATUTE AND REGULATIONS INVOLVED.

Internal Revenue Code of 1939.

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * *

(c) [as amended by Section 7(a) of the Act of October 25, 1949, c. 720, 63 Stat. 891] *Transfers in Contemplation of, or Taking Effect at, Death*—

(1) *General Rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

* * *

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;

* * *

(26 U. S. C. 1946 ed., Supp. III, Sec. 811.)

Treasury Regulations 105.

Sec. 81.18 [as amended by T. D. 5834, 1951-1 Cum. Bull. 72]. *Transfers with possession or enjoyment retained.* (a) *General Rule.*—Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, section 811(c)(1)(B) requires the inclusion in the gross estate of the value of all property transferred by the decedent, whether in trust or otherwise, if the decedent retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property (1) for his life; or (2) for any period not ascertainable without reference to his death; or (3) for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period. Except as provided in paragraph (b) of this section, such property is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

(b) *Estate of decedents dying before January 1, 1950.* In the case of a decedent who died before January 1, 1950, property shall not be included in the gross estate under this section unless transferred—

(1) after March 3, 1931, and before June 7, 1932, and the retention or reservation by the decedent was (A) for his life or (B) for such a period as to evidence his intention that it should extend at least for the duration of his life, and his death occurs before the expiration of such period; or

(2) on or after June 7, 1932.

* * *